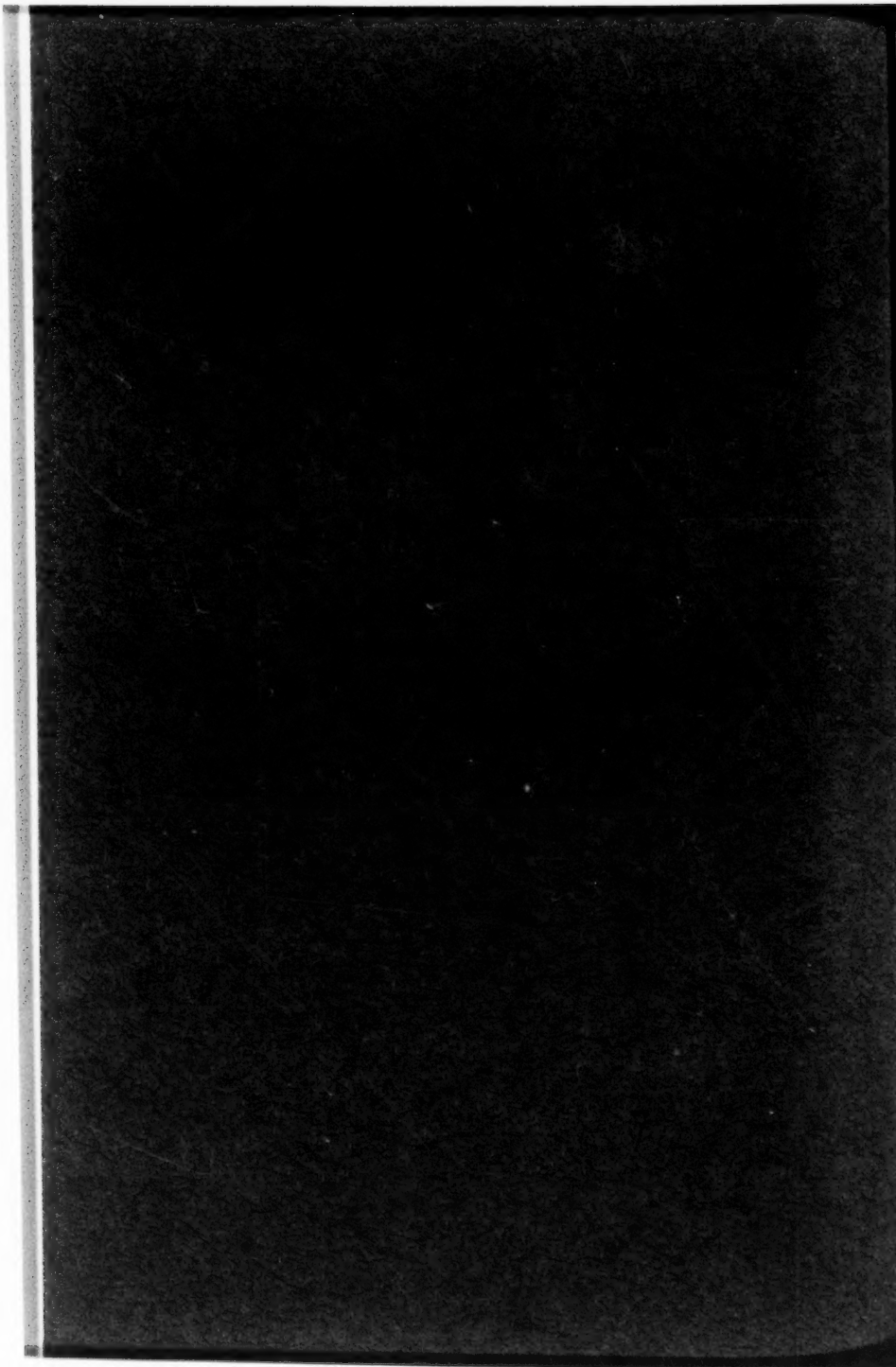

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 440

MAX GOLDBERG, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court did not write an opinion (R. 138–139). The opinion of the Circuit Court of Appeals (R. 160–173) is reported in 143 F. (2d) 752.

JURISDICTION

The opinion of the Circuit Court of Appeals was filed on June 28, 1944 (R. 160–173). A petition for rehearing was denied on August 1, 1944 (R. 203). The petition for a writ of certiorari was filed September 6, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioner, under the admitted material facts in this case, was one of the real or beneficial pro rata owners of the 930 shares of bank stock purchased with funds subscribed by 36 persons (including petitioner), under the terms of a Trust or Syndicate Agreement and registered in the name of a nominee who had no interest, financial or otherwise, in the stock.

2. Whether, on the facts in this case, an actual and beneficial owner of Illinois bank stock can contractually insulate himself, through a Trust or Syndicate Agreement, from the liability provided in the Constitution and statutes of Illinois.

3. Whether the judgment entered against the registered owner, in this case an admitted nominee, constitutes an election by the creditor and operates to release the real owner.

4. Whether, on the record in this case, a summary judgment was properly entered by the district court.

5. Whether the court below properly included in the judgment interest computed from the date of the filing of respondent's amended complaint against the petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Illinois Constitution and statutes are set forth in the Appendix, *infra*, p. 19.

STATEMENT

The facts as alleged in the original complaint of respondent, Reconstruction Finance Corporation (herein called "RFC") (R. 2–29), in RFC's amended complaint (R. 34–38), as admitted by Goldberg's amended answer (R. 87), and as adduced by Goldberg's answers (R. 52) to RFC's request for admissions (R. 40–49), pursuant to Rules 26 and 36 of the Federal Rules of Civil Procedure and in response to questions propounded at a deposition hearing (R. 53–61), may be summarized as follows:

RFC was a creditor of the Central Republic Trust Company (formerly Central Republic Bank and Trust Company), an Illinois state bank [1] which thereafter defaulted under its obligation (R. 22–23).

On November 19, 1934, RFC brought suit against stockholders of the bank to enforce their liability under the Illinois Constitution and statutes (R. 2–29). One Robert W. Martin was the registered owner of 930 shares of stock and was made a defendant (R. 11). On May 1, 1937, a decree was entered against Martin as such record owner for $93,000, together with costs and interest at the rate of five percent per annum from May 1, 1937 (R. 43, 52).

[1] On June 29, 1932, RFC loaned the bank $30,000,000.00 and on October 6, 1932, $50,000,000.00, which loans were evidenced by notes (R. 9). Petitioner admits that a balance still remains unpaid on the aforementioned debt (R. 41, 52).

The decree against Martin contained the following provision (Tr. 59):[2]

> In addition, this decree shall be without prejudice to any future hearing or proceeding in this cause, * * * against any or all persons who may be liable in any manner on account of shares of stock of said bank * * * which any persons at any time owned * * * and for the purpose of any such future hearing or proceeding in this cause this Court expressly retains jurisdiction of this cause.
>
> Plaintiff, with leave of this Court, may amend and supplement its bill of complaint or file such other pleadings in this cause as may be necessary, at any time hereafter, against any of the defendants in this cause or against any other persons referred to in this paragraph * * *.

Thereafter, early in June 1937 (R. 66), RFC first learned that Martin had been secretly acting as a nominee for others and that in fact thirty-six persons, who had subscribed to a certain Syndicate Agreement dated June 1, 1929 (R. 44–49), herein sometimes referred to as the "Illinois Se-

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[2] By reason of the order entered by the court below on January 19, 1944 (R. 149) following petitioner's motion filed January 13, 1944 (R. 148), the decree against Martin, which was the original decree and contained the above reservation of jurisdiction, was omitted from the printed record. Accordingly, it is necessary to refer to the Original Transcript of Record as distinguished from the Printed Transcript of Record by using the symbol "Tr." preceding the page reference. The symbol "R." refers to the printed record.

curities Syndicate," or the "Syndicate," had in fact subscribed $495,000 for investment by Goldberg and two others constituting the Managing Committee of the Syndicate (R. 44).

Petitioner has admitted that:

1. The bank stock registered in Martin's name was purchased with funds of the Syndicate (R. 42, 52; Pet. 5).

2. He subscribed $100,000 or 100/495ths of the total amount subscribed by the Syndicate members for investment by the Managing Committee (R. 35, 88; Pet. 5).

3. Martin was directed by Goldberg and two others constituting the Syndicate Managers to send all dividend checks received by him on securities held by the Syndicate, for which Martin was acting as nominee, to petitioner (R. 50, 52).

4. The bank stock stood in Martin's name on the date of RFC's advances to the bank (R. 42, 52; Pet. 5).

5. RFC's notes from the bank remain unpaid (R. 41, 52).

6. All dividends paid to Martin on account of the bank stock so registered in his name were paid by him to the Managing Committee of the Syndicate (R. 42, 52; Pet. 5, 27).

7. No funds or moneys of Martin were used to purchase the bank stock so registered in his name (R. 42, 52; Pet. 26).

On July 8, 1941 (R. 34), petitioner and six other Syndicate members were made parties defendant

to respondent's original suit by an amendment to the original complaint pursuant to the reservation of jurisdiction contained in the decree of May 1, 1937 (Tr. 59).

In substance, the amended complaint, after stating the ultimate facts relating to the creation of the Syndicate and the subscription of $495,000 thereto (R. 34–35), alleged respondent's claim against petitioner alternatively.[3]

Goldberg has paid nothing on account of the liability attaching to the 930 shares of stock registered in Martin's name. His subscription, the largest of all, to the Syndicate, was $100,000 [84–85], which was 100/495ths of the aggregate amount ($495,000) subscribed to the Syndicate (R. 84). Respondent's proportionate share of the liability measured by the decree against Martin was $18,787.88, plus interest on said sum.

The hearing on plaintiff's motion for summary judgment[4] was based upon the record of this

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[3] This was in accordance with Rule 8 (e) (1), (2) of the Federal Rules of Civil Procedure. The alternative allegations are in substance as follows: That Goldberg was the actual and beneficial owner of 187 8,788/10,000ths of the 930 shares of the stock of the bank registered in Martin's name [Par. 15 ii (h), R. 36]; or that the Syndicate members were copartners and as such were the actual and beneficial owners of the 930 shares of bank stock registered on the bank's books in the name of Martin [Par. 15 ii (a) to (h) incl., R. 37]; or the Managing Committee were the actual or beneficial owners, or Goldberg was the actual and beneficial owner of said 930 shares of bank stock so registered in Martin's name, as aforesaid [Par. 15 jj (a) to (c) incl., R. 37, 38].

[4] Rule 56, Federal Rules of Civil Procedure.

cause, including certain designated pleadings, depositions, admissions, and affidavits (R. 83).[5]

On December 17, 1943, the District Court entered a summary judgment (R. 138) against Goldberg in the amount of $18,787.88, together with interest on said sum from May 1, 1937, the date of the original judgment, until paid, at the rate of five percent per annum and costs. The court below affirmed, except that the decree of the District Court was modified to compute interest from July 8, 1941, the date of the filing of respondent's amended complaint against Goldberg (R. 170–173).

ARGUMENT

The decision below is correct. It is consistent with the provisions of the Constitution and statutes of Illinois (Appendix, *infra*, p. 19) and is not in conflict with apposite local decisions.[6]

1. The facts enumerated at pages 4 and 5, *supra*, represent all of the material facts involved in this case and are admitted by petitioner and establish him as one of the real, actual, and beneficial owners of the bank stock registered in the name of the nominee Martin. As such real owner petitioner is liable to RFC.

2. The Supreme Court of Illinois has declared

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[5] Rule 56 (c), Federal Rules of Civil Procedure.

[6] The parties conceded in the court below that this case involved a question of local law only, and the decision below recognized that Goldberg's liability must be decided in accordance with the law of Illinois (R. 164).

that registered owners of Illinois state bank stock are liable to the bank's creditors (*Golden* v. *Cervenka,* 278 Ill. 409); that the liability is a primary one imposed by the Constitution and the statute and is read into the contract of purchase by operation of law, whenever a share of stock is bought; that the liability does not spring from any wrong or failure to observe the law (*Heine* v. *Degen,* 362 Ill. 357, 379); and that such constitutional and statutory liability will also fall upon the real owners of such stock even though they are not owners of record (*Gahagan* v. *Whitney,* 359 Ill. 419; *Hood* v. *Commonwealth Tr. & Sav. Bank,* 376 Ill. 413). It is further established by the decisions that a court will seek out and determine who the real owner is (*Gahagan* v. *Whitney, supra*).

Petitioner contends that he is liable neither as a trustee nor as a beneficiary under the Trust Agreement (R. 44–49), although he admits that he was one of three trustees named in the agreement, and that his subscription of $100,000, together with the funds subscribed by other members of the Syndicate, was used to purchase the bank stock in the name of the nominee Martin (R. 41–42, 52; 35, 88). He attempts to sustain his contentions on two grounds: first, that the bank stock was purchased with funds subscribed by members of the Syndicate and pursuant to the provisions of a Trust Agreement (R. 44–49) creating a valid trust under the laws of Illinois (Pet. 33–34); and second, that the agreement con-

tained a provision exculpating the trustees and individual members or beneficiaries of the trust from liability (R. 47). The case of *Anderson* v. *Abbott,* 321 U. S. 349, cited at pages 22–24, 32–33 of his Petition, involving as it does liability under the national banking acts, does not support his first ground, and the cases of *Martin* v. *Central Trust Company,* 327 Ill. 622 (Pet. 27–28) and *Rittenberg* v. *Murnighan,* 381 Ill. 267 (Pet. 29–31) are factually distinguishable from the case at bar, since neither of the two cases involves liability of a stockholder in an insolvent Illinois bank. The Illinois cases cited at pages 26 to 35 are not contrary to the opinion of the court below, as will appear from the following discussion.

The decisions relied on by petitioner to support his contentions that he is neither liable as a beneficiary (Pet. 33, 34) nor as a trustee (Pet. 35–49) are not in conflict with the decision below. The case of *Schumann-Heink* v. *Folsom,* 328 Ill. 321, and the other Illinois cases cited by petitioner (Pet. 35–42) do not involve facts such as exist here. Petitioner ignores his dual position as a member and trustee of a Syndicate which purchased bank stock not in the name of the Syndicate Trustees but in the name of a nominee or dummy. In the *Folsom* case plaintiff sought to hold the trustees of a Massachusetts or common-law trust liable under a contract entered into by such trustees. The contract showed on its face that the individual liability of the signatory

trustees was limited to the trust estate, and the court refused to hold the trustees personally liable since the contract negatived their individual liability. *Levy* v. *Nellis,* 284 Ill. App. 228 (Pet. 44), followed this rule. The members of a business trust were held liable as partners in the case of *In re Estate of Conover,* 295 Ill. App. 443, because there was no limitation of liability as in the *Folsom* case, and evidence disclosed that the beneficiary actively participated in the affairs of the trust.

Here the stock was registered in the name of a nominee, and it was not until Goldberg produced the Trust Agreement (R. 55–57, 77) that the exculpatory provision contained in the agreement (R. 47) was disclosed to RFC. Since the liability asserted by RFC against Goldberg was based upon the contract imposed by the Constitution and statutes of Illinois, which are read into the contract of purchase of the bank stock by operation of law (*Golden* v. *Cervenka,* 278 Ill. 409; *Heine* v. *Degen,* 362 Ill. 357, 379), and is not based upon the Trust Agreement (which is a contract between the trustees and members of the Syndicate), the escape clause, urged by petitioner, affords him no defense. This distinction is clearly established in the case of *Review Printing & Stationery Co.* v. *McCoy,* 291 Ill. App. 524 (Pet. 33), where, in a suit instituted to enforce liability against trustees of a business trust, the exculpatory provision of the trust agreement was asserted as a

defense. In refusing to give effect to this provision, undisclosed to the creditor at the time the contract was executed, the court stated (p. 538):

> In order therefore for appellees [defendant trustees] not to be liable upon the contract, *which forms the basis of this suit,* appellees must have stipulated that they were not to be presently liable, but that appellant [creditor] was to look solely to the trust estate. (Italics supplied.)

The record here is devoid of any evidence either that the liability on account of the bank stock purchased in the nominee's name was to be limited to the assets of the trust estate or that RFC had knowledge of the existence or content of the Trust Agreement on the dates that it lent moneys to the bank. Petitioner argues otherwise (Pet. 40, 42, 45, 54), but the record fails to support his contentions, as is stated in the decision below (R. 165, 166).[7] Moreover, if any doubt ever existed, petitioner

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[7] Petitioner inadvertently reveals the inconsistency of his position when he states (Pet. 42) that RFC knew of the existence and terms of the Trust Agreement because: "* * * a copy of the Declaration of Trusts was given to the seller [Bank] * * *" and (Pet. 43) when he states: "When the Bank stock was registered in the nominee Martin for the benefit of the Syndicate, *it was expressly agreed between the Managing Committee and the officers in charge of the transaction at the Bank* that neither the members of the Managing Committee nor the Syndicate Members shall be individually liable (R. 99–100)." [Italics supplied.]

concedes the point when he states (Pet. 55): "All of the facts were known to it [RFC] on June 18, 1937 [RFC made the bank loans in 1932] when it elected to retain the judgment against Martin."

Petitioner cites authorities in support of his contention that it is the declared public policy of Illinois not to hold a trustee personally liable for the debts of the trust estate (Pet. 36–40). These decisions are not in conflict with the decision below but simply have no application to the issues presented here. In *United States* v. *Earling,* 39 F. Supp. 864 (E. D. Wis.) (Pet. 36), Judge Duffy, sitting in the District Court for the Eastern District of Wisconsin, held that the State of Wisconsin had authority to regulate it own banks and trust companies, and that a Wisconsin bank cannot subject itself generally to a stockholder's liability, and therefore a Wisconsin bank was not liable on Illinois bank stock registered in its name as trustee. In *Flanagan* v. *First National Bank of Chicago,* 307 Ill. App. 495 (Pet. 37), the court held that a bank is by statute a creature of limited powers and that the Illinois Banking Act gives no authority to a bank to acquire stock of another bank or to incur constitutional or statutory liability thereon, and that it would be contrary to public policy of Illinois to endanger the solvency of a bank by the enforcement against it individually of the "contingent" nonledger liability arising from the ownership of

bank stock registered in its name as trustee. The Illinois cases cited by petitioner (Pet. 38–40) are also not in conflict with the decision below. The cases cited at pages 41–42 of the Petition show, by petitioner's quotations therefrom, either that the contracts sued upon contained a provision expressly negativing the personal liability of the signatory trustees or that the creditor had agreed to look solely to the trust estate rather than to the trustee individually.

3. Petitioner next asserts (Pet. 50–58, 60) that RFC, having taken judgment against the registered owner, is barred from proceeding against the real owner. The decree of May 1, 1937, adjudicating the liability of the record owner in the amount of $93,000 with interest and costs (Tr. 32–36, 63), at Paragraph XX reserved jurisdiction in express language against any person who might be liable on account of the bank stock (Tr. 59).

The fact that RFC had a remedy against the record owner and proceeded to enforce its remedy to judgment does not bar RFC from enforcing its separate remedy, pursuant to the reservation contained in the decree of July 1, 1937, against the real owner as long as there is but one satisfaction. The basis of liability of each, as is now well established, is different—apparent or titular ownership in one case, actual or beneficial ownership in the other. Hence, the issues involved in each case are not the same.

Reconstruction Finance Corp. v. *Pelts,* 123 F. (2d) 503 (C. C. A. 7); *Reconstruction Finance Corporation* v. *Barrett,* 131 F. (2d) 745 (C. C. A. 7); *Gahagan* v. *Whitney,* 359 Ill. 419 (see also *Anderson* v. *Abbott,* 321 U. S. 349).

Petitioner cites (Pet. 51, 62) the case of *Capetti* v. *Allborg,* 319 Ill. App. 643, and argues in effect that this decision establishes a new rule of law in Illinois which is controlling in this case. This contention is clearly a misconception of the holding in the case based upon the state of facts there existing. The *Capetti* case, reported in abstract form, is a companion case to *Trupp* v. *First Englewood State Bank,* 307 Ill. App. 258. Both the *Trupp* and *Capetti* cases, in substance, hold that where a decree is entered adjudging the liability against defendants named therein and jurisdiction is not reserved, as it was in the case at bar, the court will not permit either supplemental proceedings, as in *Trupp* case, or a new suit, as in the *Capetti* case, to relitigate ownership of bank stock.

4. Petitioner next asserts that a summary judgment was improper here, and in support of such contention urges that his amended answer presented factual issues: (a) laches (Pet. 59–60) and (b) the ownership of the bank stock (Pet. 61). He argues, in effect (Pet. 60), that when RFC filed its motion for summary judgment it admitted the sufficiency of the formal defense tendered by his amended answer, as well as its

truth, although he filed no opposing affidavits as he might have done under Rule 56 (c).[8]

The contentions made by petitioner are based upon a misconception of the purpose and effect of the motion filed under Rule 56 (c). As has been frequently and consistently held (*Fishman* v. *Teter,* 133 F. (2d) 222 (C. C. A. 7); *Fletcher* v. *Krise,* 120 F. (2d) 809, 811–12 (App. D. C.), certiorari denied, 314 U. S. 608; *Beall* v. *Pinckney,* 132 F. (2d) 924, 925 (C. C. A. 5)), the purpose of Rule 56 is to dispose of cases where there is no genuine issue of fact, even though an issue may be raised formally by the pleadings.

Petitioner complains (Pet. 59–60) that RFC delayed in filing its amended complaint against him. It is well recognized that mere delay alone, for a period less than that covered by the period of limitations, is not laches, but it is only when the delay is accompanied by some other elements

[8] Plaintiff filed its motion for summary judgment pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure. At the hearing, the district court had before it the record in this cause, which included the Decree of May 1, 1937 (Tr. 26–62), the pleadings (Complaint (R. 2), Supplemental Complaint (R. 30), Amendment to Bill of Complaint (R. 34), Goldberg's Amended Answer (R. 87)), the depositions of Goldberg (R. 53) and O. John Rogge (R. 64) taken pursuant to stipulation of the parties (R. 53 and 63), Goldberg's Answers (R. 52) to RFC's request for admissions (R. 40) and Goldberg's Answer (R. 51) to RFC's Interrogatory (R. 39), together with the affidavits filed by RFC of Charles H. Albers, Receiver in this cause, and an officer of the Federal Reserve Bank of Chicago in charge of RFC's Custody Division (R. 84 and 92).

rendering it inequitable for a plaintiff to assert its rights that laches will bar the right of recovery within the statutory period. *Chicago Medical School* v. *Wilson,* 341 Ill. 170, 178–180; *Luttrell* v. *Wyatt,* 305 Ill. 274, 283. Petitioner has failed to show by facts alleged in his answer or by affidavit that his position was any different on July 8, 1941, when RFC's amended complaint was filed, from that which existed on May 1, 1937, when the decree against Martin was entered. The record on the contrary discloses (R. 59–61) that Goldberg knew of his potential liability as early as June 16, 1937. The cases cited by petitioner in support of his defense of laches (Pet. 59–60) are clearly distinguishable from the case at bar on the facts.

Petitioner has failed to establish a genuine material issue of fact as to his real ownership of a pro rata portion of the stock registered in the nominee's name. The denial in his amended answer of actual and beneficial ownership of the stock (R. 97) is contradicted by his answer (R. 52) to RFC's request for admissions (R. 40–43) and particularly Paragraphs 5 to 14 inclusive thereof (R. 41–43), wherein petitioner admitted that the bank stock registered in the nominee's name was purchased by the Syndicate with funds subscribed by himself and others and that he never transferred his interest in the Syndicate.

The argument made by petitioner as to the existence of factual issues (Pet. 59–60) ignores the

provisions of Rule 56 (c)[9] and demonstrates his failure to appreciate the logical legal inferences and conclusions which were plainly drawn by the trial court, in entering the summary judgment (R. 138–139), and by the court below in its opinion (R. 160–173). The nonexistence of a genuine issue of fact on all of the formal issues raised by Goldberg in his defense is clearly demonstrated by the record as made. Goldberg offered nothing except the conclusions and allegations of immaterial facts contained in his amended answer (R. 87, 91) as further amended (R. 97, 98–100) at the date of the hearing before the District Court (R. 102, 108).

5. Petitioner last contends that the allowance of interest was improper. The court below in its discretion concluded that the equities involved here require that there be included in RFC's judgment interest from July 8, 1941, the date of the filing by RFC of its amended complaint against Goldberg, rather than from December 17, 1943, the date of the judgment against the nominee. The cases of *Lewis* v. *West Side Trust & Savings Bank,* 376 Ill. 23 and *American Light & Traction Co.* v. *Harrison,* 142 F. (2d) 639 (C. C. A. 7), cited at page 63 of the petition, are not con-

[9] Rule 56 (c) provides in part as follows: "* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that * * * there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

trary to the decision below. The *Lewis* case involved an appeal and cross-appeal from a decree to enforce stockholders' liability. Among other points raised was the contention that the terms of the decree should have included interest from the date of either the Bank's closing or the audit which was made in connection with establishing the stockholders' liability. This contention the court overruled. The *Harrison* case involved a controversy arising under the Federal income-tax statutes and obviously has no bearing on the interest question.

CONCLUSION

The decision below is correct; it is not inconsistent with relevant State decisions; and no question of general Federal law is presented. The petition should therefore be denied.

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OCTOBER 1944.